

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 8, 2015 appellant, then a 46-year-old social scientist, filed an occupational disease claim (Form CA-2) alleging that her exposure to a hostile work environment aggravated her depression and anxiety, which caused physical manifestations in her body resulting in irritable bowel syndrome and restless legs.

In support of her claim, appellant submitted a narrative statement dated June 11, 2015 indicating that she was first diagnosed with depression and anxiety on or around 2009. She claimed that she was harassed by three people, W.L., Director of Eastern Kentucky University's (EKU) Office of Military and Veterans Affairs (OMVA), J.L., the Chief Vocational Rehabilitation & Employment Officer, and T.B., appellant's supervisor. Appellant stated that they yelled at her in front of other people at work and left her isolated in a building without telling her that the office was being closed. She alleged four compensable employment factors including: (1) a January 2011 meeting with an assistant director to discuss issues and who suggested mediation, which was not agreed to by J.L., and working with an Equal Employment Opportunity counselor to resolve appellant's issues at work; (2) during the performance evaluation period of 2011, appellant disagreed with her overall rating which caused her stress, she submitted a rebuttal memorandum, and was awarded a higher rating; (3) T.B., informed appellant about an EKU allegation that she was trying to change the university grading system and that EKU made additional allegations to OMVA; and (4) a five-week period of investigation was conducted, per J.L., from July to August 2014, which resulted in appellant's temporarily being reassigned to the Lexington, KY office, which was 37 miles away (one way) from her workstation and required an additional two-hour, daily round trip commute.

Appellant further alleged that the following work incidents occurred: (1) in most of 2011, she experienced ongoing managerial problems between J.L. and herself, where J.L. was hostile towards her in most of her interaction and treated her unfairly and differently than she had others, which caused her frequent abdominal pain and bouts of fainting spells; (2) a couple of medicinal manifestations began to exhibit themselves, which resulted in her having multiple tests to identify medical problems, resulting in her physician offering her gall bladder surgery since she continued to experience abdominal pain; (3) from December 2014 through May 2015, various problematic interactions continued to increase between appellant and the EKU OMVA staff, primarily with W.L., where she informed J.L. and T.B. via e-mail and telephone calls regarding her issues and concerns; and (4) appellant sent an e-mail to management on May 5, 2015 stating, "I was working in a hostile work environment and asked for their help that week and immediately" and the following week sent an e-mail to J.L. asking her to please let her know what steps had been taken to resolve her hostile work environment with W.L.

In a May 29, 2015 report, Dr. J. Yun Kim, an emergency medicine specialist, noted that appellant was seen with reported history of restless leg syndrome and presented relating pain in her legs and spasms that had been ongoing for the past several months. Appellant related increased stress at work as a possible etiology. Dr. Kim diagnosed bilateral leg pain, restless leg syndrome.

On July 3, 2015 Dr. Betsy Ederer and Dr. Monnica Williams, licensed clinical psychologists, diagnosed post-traumatic stress disorder, major depressive disorder (recurrent, severe), panic disorder without agoraphobia, and "target of adverse discrimination or persecution."

They opined that appellant's current symptoms and difficulties were a result of ongoing work harassment and a hostile work environment and advised that she was not capable of returning to work.

By decision dated December 10, 2015, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish a compensable employment factor. As such, it did not review or consider the medical evidence of record.

On January 12, 2016 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held before an OWCP hearing representative on August 31, 2016. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In response, appellant submitted a September 20, 2016 addendum report from Drs. Ederer and Williams reiterating their medical opinions.

By decision dated November 2, 2016, OWCP's hearing representative affirmed the prior decision finding that appellant had failed to establish a compensable employment factor.

On March 16, 2018 appellant requested reconsideration. She submitted a January 28, 2018 narrative statement alleging that OWCP's hearing representative failed to conduct the oral hearing in a professional manner, was dismissive of the facts, and did not afford her and her union representative an opportunity to ask pertinent questions. Appellant further alleged that she did not believe that all of the factual and medical evidence submitted had been reviewed by OWCP and argued that it seemed that OWCP's system was severely flawed, highly insensitive towards applicants like her, and had penalized her because she had exercised her right to file a claim. She further submitted documentation regarding a State of Kentucky workers' compensation claim she had filed.

By decision dated April 9, 2018, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that her letter expressed her perception that OWCP was against her, but failed to present evidence to demonstrate that OWCP had committed an error at the time of the issuance of its decision. OWCP further found that the paperwork from Kentucky's Workers' Compensation Appeals Board failed to demonstrate that OWCP committed an error as it was a separate entity from the federal government.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.² This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's

² *Id.* at § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

decision for which review is sought.³ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System.⁴ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁵

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.⁶ If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.⁷

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.⁸

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.⁹ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁰

³ 20 C.F.R. § 10.607(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁵ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.*; *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010); *supra* note 4 at Chapter 2.1602.5 (February 2016).

⁸ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 4 at Chapter 2.1602.5(a) (February 2016).

¹⁰ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The most recent merit decision was OWCP's hearing representative's November 2, 2016 decision. Appellant had one year from the date of that decision to make a timely request for reconsideration. Since her request was not received by OWCP until March 16, 2018, it was filed outside the one-year time period.¹¹ As appellant's March 16, 2018 request for reconsideration was received more than one year after the November 2, 2016 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in the denial of her claim.¹²

In the November 2, 2016 decision, OWCP's hearing representative denied appellant's emotional condition claim, finding that appellant had failed to establish a compensable employment factor. In support of her untimely request for reconsideration, appellant submitted a January 28, 2018 narrative statement alleging that OWCP's hearing representative unfairly upheld the initial decision denying her claim. She further alleged that she did not believe that all of the factual and medical evidence submitted had been reviewed by OWCP and that it was highly insensitive towards applicants like her, and had penalized her because she had exercised her right to file a claim. This evidence fails to address the issue that was before OWCP at the time it issued its November 2, 2016 decision, which was whether the evidence submitted was sufficient to establish a compensable factor of her federal employment. Appellant has provided no evidence to demonstrate that OWCP acted improperly or failed to review the evidence she submitted in support of her claim. Therefore, the Board finds that this narrative statement does not demonstrate clear evidence of error because it does not show that OWCP committed an error in denying appellant's emotional condition claim, nor raise a substantial question as to the correctness of OWCP's decision.

Appellant further submitted documentation regarding her case before the Kentucky Workers' Compensation Appeals Board. This evidence fails to constitute probative evidence establishing that she actually experienced the employment factors alleged to have caused injury. Therefore, the Board also finds that this documentation does not demonstrate clear evidence of error because it does not show that OWCP committed an error in denying appellant's emotional condition claim, nor does it raise a substantial question as to the correctness of OWCP's decision.

To demonstrate clear evidence of error, it is insufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.¹³ None of the evidence submitted manifests on its face that OWCP committed an error in denying appellant's emotional condition claim. Appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to

¹¹ *Supra* notes 3 and 4.

¹² 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

¹³ *Supra* note 4 at Chapter 2.1602.5.a (February 2016); *see Dean D. Beets*, 43 ECAB 1153 (1992).

the correctness of OWCP's decision. Thus, the evidence is insufficient to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board